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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 296

EUREKA WILLIAMS CORPORATION,
Petitioner,

vs.

WILMER E. McCORQUODALE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

EDWIN J. BALLUFF,
Counsel for Petitioner.

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EUREKA WILLIAMS CORPORATION,
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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Eureka Williams Corporation, Petitioner, prays that a writ of certiorari issue to review the United States Court of Customs and Patent Appeals' decision (R. 204-214) and judgment (R. 214) dismissing Petitioner's opposition (R. 88-110) to the Respondent's application (R. 9-12) for registration of a trade mark under the Trade-Mark Act of 1946. Such Court's decision (R. 204-214) and judgment (R. 214) were entered on June 3, 1953 (after a rehearing, one of the Judges dissenting).

This petition seeks the exercise by the Supreme Court

of its power of supervision to review and correct the erroneous determination by the Court of Customs and Patent Appeals of two important and substantial questions of law which formed the basis of its decision—the first involving a substantial departure from the accepted and usual course of judicial proceedings, and the second involving an interpretation of a section of the Trade-Mark Act of 1946 contrary to the wording thereof and contrary to the applicable earlier decision of the same Court involving the corresponding section of the preceding Act.

Opinions Below

The opinion of the Court of Customs and Patent Appeals on rehearing (R. 204-214) is reported at 98 USPQ 138. Its original opinion was not published, but was withdrawn after the rehearing and the reissued opinion of June 3, 1953, substituted therefor (R. 214). The original decision of the United States Patent Office sustaining the opposition will be found at R. 159 and that of the Examiner-in-Chief dismissing the opposition will be found at R. 163.

Jurisidiction

The final judgment (R. 214) of the Court of Customs and Patent Appeals on rehearing was entered on June 3, 1953. Jurisdiction of this Court is conferred under 28 U. S. C. 1256, enacted June 25, 1948, and 15 U. S. C. 1122, enacted July 5, 1946. These recent statutory enactments considered in the light of the decisions in *Pope* v. *U. S.*, 323 U. S. 1, 13, *Hoover* v. *Coe*, 325 U. S. 79, and *Special Equipment Company* v. *Coe*, 324 U. S. 370, warrant the Supreme Court in passing upon the two important and substantial questions of law which Petitioner asserts were erroneously decided by the Court of Customs and Patent Appeals acting in its judicial capacity in this case. The interpretation which

such Court in effect placed on 15 U. S. C. 1052 in its decision (R. 204-214) in this case involves a construction of a federal statute by the Court of Customs and Patent Appeals acting in its judicial capacity, and as such is reviewable by this Court. See "Supreme Court Review of the Court of Customs and Patent Appeals—Patent Office and Tariff Commission Cases," by Kurland and Wolfson, George Washington Law Review, Vol. 18, pp. 192-200, Dec. 1949.

The Questions Presented

1. Where the parties to a trade mark opposition (under 15 U. S. C. 1063 and 1052) have stipulated that their respective heating products "are of the same descriptive properties," does the Court of Customs and Patent Appeals have the right, in dismissing the opposition, and in derogation of such stipulation, to rely on specific differences in such goods?

2. Under 15 U. S. C. 1052, does the Court of Customs and Patent Appeals have the right to refuse to consider Petitioner's (Opposer's) 1933 trade mark registration because it is subsequent to the first use of the mark which Respondent (Applicant) seeks to register?

The Statutes Involved

The pertinent statutory provisions are printed in Appendix A, infra, p. 13.

Statement

Petitioner, Eureka Williams Corporation, and its predecessor, Williams Oil-O-Matic Heating Corporation, of Bloomington, Illinois, since 1920 have been engaged in the manufacture and sale of various heating products under the trade mark OIL-O-MATIC. OIL-O-MATIC heating products have been extensively sold and advertised through-

out the United States and in many foreign countries (R. 116). OIL-O-MATIC was originally registered in 1925 for liquid fuel burning devices (R. 97), in 1930 was registered for automatically electrically controlled and operated fuel heating systems (R. 103), and was registered for domestic water heaters specifically in 1933 (R. 105).

Respondent (Applicant) filed his application for registration of the mark HOTOMATIC for automatic gas water heaters in September 1947, claiming use since August 1928 (R. 9). Respondent has made very little use of his mark, his sale of hot water heaters probably never exceeding 150 in any one year, and of these approximately 75% were sold in Texas (R. 76), in natural gas territory. Petitioner, relying upon it prior use and registration of the mark OIL-O-MATIC for heating products, opposed the application for registration under 15 U. S. C. 1063, asserting that registration of HOTOMATIC was likely "to cause confusion or mistake or to deceive purchasers" (15 U. S. C. 1052). As is frequently done in opposition proceedings, the parties stipulated in writing "that the respective goods of the parties involved are goods of the same descriptive properties" (R. 144). Relying on this stipulation to dispose of any controversy concerning the goods, as it had every right to do, Petitioner took no testimony concerning the goods and proceeded on the assumption that the only question presented for determination in the opposition was whether the marks involved, OIL-O-MATIC and HOTOMATIC, were confusingly similar.

The Examiner of Trade Mark Interferences held (R. 159, 161) that the differences in the goods

> "are deemed to be insufficient to enable their concurrent sale under confusingly similar marks without giving rise to a reasonable likelihood of confusion or deception of purchasers,"

and in addition held the marks to be confusingly similar.

On appeal, the Examiner-in-Chief (R. 163, 164) held:

> "the respective goods of the parties are considered such that the use of the same or confusingly similar marks on them would be likely to give rise to confusion,"

but reversed the decision of the Examiner of Interferences as to the confusing similarity of the marks on the authority, primarily, of the decision of the Assistant Commissioner in *Eureka Williams* v. *Willoughby*, 86 USPQ 170, since reversed by the Court of Customs and Patent Appeals, 93 USPQ 12, 39 C. C. P. A. (Patents) 832, 194 F. 2d 543.[1]

After reversing the decision of the Assistant Commissioner in the Willoughby case and holding THERMOMATIC confusingly similar to OIL-O-MATIC, it seems to Petitioner that the Court of Customs and Patent Appeals could not avoid holding HOTOMATIC confusingly similar to OIL-O-MATIC in the present case. However, being unable to say or find that the marks HOTOMATIC and OIL-O-MATIC were so confusingly similar without more, the Court rested its holding on the ground (as asserted by Respondent) that

> "the goods of the parties are substantially different, whereas in the Willoughby case the goods were closely similar and competitive with each other."

On rehearing it was pointed out that the stipulation that the goods were "of the same descriptive properties" disposed of such an issue, but the Court in its opinion after the rehearing, stated (R. 208) that the stipulation

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[1] In the Willoughby case, after the Examiner of Interferences of the Patent Office had held THERMOMATIC to be confusingly similar to OIL-O-MATIC, the Assistant Commissioner reversed, and on appeal the Court of Customs and Patent Appeals, by a divided Court, reversed the decision of the Assistant Commissioner and held THERMOMATIC for gas conversion burners to be confusingly similar to OIL-O-MATIC.

"cannot foreclose the right of the reviewing Court to point out and observe perfectly obvious differences, which actually exist, and which we feel were not intended to be overlooked because of a strict limitation that might be drawn from the language of such a stipulation."

Both of the Patent Office tribunals had found, on the basis of the stipulation and of the law, that the respective goods were of the same descriptive class and that the goods of the parties were such that the use of the same or confusingly similar marks on them would be likely to give rise to confusion. The appeal to the Court of Customs and Patent Appeals (R. 176) by Petitioner did not raise or need to raise any issue about the goods since this issue was settled not only by the stipulation but also had been determined in Petitioner's favor. Therefore, the real issue presented for determination to the Court of Customs and Patent Appeals by the appeal which Petitioner took was whether the marks were confusingly similar.

Reasons for Granting Writ

1. THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS DISMISSING THE OPPOSITION BY RELYING ON SPECIFIC DIFFERENCES IN THE GOODS, IN DEROGATION OF THE STIPULATION THAT THE RESPECTIVE GOODS OF THE PARTIES "ARE OF THE SAME DESCRIPTIVE PROPERTIES", IS AN ARBITRARY, SUBSTANTIAL VIOLATION OF THE PETITIONER'S RIGHTS AND IS DIRECTLY CONTRARY TO THE ACCEPTED AND USUAL PRACTICES CONCERNING THE USE OF STIPULATIONS IN LITIGATION.

As stated in "WIGMORE ON EVIDENCE", Third Edition, a stipulation is a judicial admission

"* * * conceding for the purposes of the the trial the truth of some alleged fact, [and] has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to

disprove it. * * * It is, in truth, a substitute for evidence, in that it does away with the need for evidence." (Section 2588)

"The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i.e. a prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it." (Section 2590)

In entering into the stipulation "that the respective goods of the parties involved are goods of the same descriptive properties," the Respondent was fully informed as to the Petitioner's products as illustrated in its Exhibits D, E, and F (R. 125-135). Such a stipulation should be determinative of any controversy concerning the goods and should effectively remove any such issue from the case.

The legal effect of such a stipulation is that the respective goods of the parties are considered such that the use of the same or confusingly similar marks on them would be likely to give rise to confusion. Both Patent Office decisions (R. 159 and R. 163) accepted the stipulation, and the appeal to the Court of Customs and Patent Appeals did not raise any issue as to the goods. Therefore, it was highly improper for the Respondent to contend that "the goods of the parties are substantially different."

A litigant should be entitled safely to rely upon a stipulation which settles an issue between the parties for the purposes of the litigation, and such a stipulation should be binding upon opposing counsel and upon the Court, and should not be judicially negated by the "feeling" of the Court that specific differences "were not intended to be overlooked."

As the parties here agreed that the goods are of the same descriptive properties, and such agreement does not appear on its face to be at all unreasonable, then it certainly

does not behoove the Court to rest its decision on facts in derogation of the stipulation, which is what the Court has done here. The Court here, in resting its decision on specific facts in derogation of the stipulation, is substantially departing from the accepted and usual consideration of stipulations by the courts, and in view of the general vital significance and widespread use of stipulations as a short cut in litigation, it is highly desirable that this Court should review this issue. If courts may "feel" free to judicially construe the substance out of a stipulation, as was done here, then certainly the Bar and litigants ought to be apprised of the fact.

Furthermore, in view of the elimination of the "same descriptive properties" rule from subsection (d) of 15 U.S.C. 1052 [Section 2(d) of the Trade Mark Act of 1946], as compared with its inclusion in the corresponding subsection (b) of 15 U. S. C. 85 [Section 5 (b) of the Trade Mark Act of February 20, 1905] as amended, no reason is evident for the unwarranted reliance by the Court of Customs and Patent Appeals on the specific differences in the goods as the basis for its decision, particularly where, as here, no issue as to the goods was before the Court for consideration on the appeal.

In addition, Petitioner's first three admittedly prior registrations all specify the goods as LIQUID FUEL BURNING DEVICES. An oil burner, a boiler heated by an oil burner, or an oil burning water heater, all are LIQUID FUEL BURNING DEVICES. This term thus generically covers the hot water heaters specifically covered by the 1933 registration and other heating products.

If Petitioner had had any idea that the stipulation would be judicially emasculated, it would have been a simple matter, when it had the opportunity, to establish by testimony that the goods of the parties are substantially identical for

trade mark purposes. The specific differences in the goods relied on by the Court are of no legal significance but were apparently relied on because the Court was unable or unwilling to hold that the marks (without regard to what it thought were substantial differences in the goods) were not confusingly similar. The Court's decision in effect reverses the decision of the Patent Office as to its holding on the character of the goods even though there was no appeal on this point. The unwarranted "construction" which the Court placed on the stipulation in effect summarily deprives Petitioner of a substantial right without the opportunity for Petitioner to submit evidence in its favor, and so far departs from the accepted and usual course of judicial practices concerning the use and effect of stipulations as to call for the exercise of this Court's power of supervision.

2. IN REFUSING TO CONSIDER PETITIONER'S 1933 TRADE MARK REGISTRATION, THE COURT OF CUSTOMS AND PATENT APPEALS HAS CONSTRUED 15 U. S. C. 1052 CONTRARY TO THE WORDING THEREOF, CONTRARY TO THE SPIRIT OF THE ACT, AND CONTRARY TO THE APPLICABLE EARLIER DECISION OF THE SAME COURT INVOLVING THE CORRESPONDING SECTION OF THE PRECEDING ACT, AND THIS INVOLVES A SUBSTANTIAL QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Subsection (d) of 15 U. S. C. 1052 prohibits registration of

> "a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or mistake or to deceive purchasers".

Petitioner's 1933 registration (R. 105) covers the mark OIL-O-MATIC for domestic water heaters, whereas Respondent's goods as set forth in his application for registration (R. 9) are specified as automatic gas water heaters. The

goods specified in Petitioner's 1933 registration and in Respondent's application are identical for trade mark purposes. However, the Court of Customs and Patent Appeals, while referring to this registration of Petitioner in its decision, refused to give it any weight because Respondent established his first use of the mark HOTOMATIC prior to Petitioner's first use of the mark OIL-O-MATIC on domestic water heaters *per se* but admittedly years after Petitioner's first use of the mark OIL-O-MATIC on liquid fuel burning devices and automatically electrically controlled and operated fuel heating systems. This point was specifically raised in the Petition for Rehearing before the Court of Customs and Patent Appeals.

The quoted excerpt from the statute clearly prohibits the registration of a mark which is confusingly similar to "a mark registered in the Patent Office". The use of HOTOMATIC by Respondent for water heaters prior to Petitioner's 1933 water heater registration is clearly irrelevant because the section of the statute with respect to registered marks is not qualified by prior use of "previous use", as is the subsequent clause pertaining to an (unregistered) "mark or trade name previously used in the United States by another and not abandoned".

In other words, the statute clearly differentiates between a mark registered in the Patent Office on the one hand, "or a mark or trade name previously used", on the other hand, *i.e.*, an unregistered previously used mark. This distinction is logical and entirely in accord with the objective and benefits of registration under the Federal Statutes. The Statute does not say or contemplate that the Commissioner has the authority to register two confusingly similar marks for the same goods, but rather specifically prohibits registration of a mark which is confusingly similar to a mark registered in the Patent Office. The effectiveness of the Trade Mark Act of 1946 and registrations issued there-

under will be seriously impaired if the construction adopted by the Court of Customs and Patent Appeals is allowed to stand, for such construction in effect authorizes the issuance of two or more registrations for the same or confusingly similar marks applied to the same goods.

As question No. 2 is an important question of Federal law which should be settled, this Court should exercise its power of supervision in this case.

The corresponding statutory provision, 15 U. S. C. 85, of the preceding Trade Mark Act of 1905 as amended, contained a provision similar to that quoted although the language is specifically different. In passing on this section of the earlier Act, in the only case directly in point that Petitioner has been able to find, the Court of Customs and Patent Appeals in *California Packing* v. *Tillman & Bendel, Inc.*, 40 F. 2d 108, 5 USPQ 59, refused to register a mark for a prior user over registrations issued to a subsequent user, stating:

> "The goods being of the same descriptive properties, so that the registration of the proposed trade mark will lead to confusion, the statute requires that registration be denied, irrespective of other legal rights between the parties."

Even though this case was decided with reference to the old Act, its reasoning appears to be sound and just as applicable to the corresponding provision of the new Act here involved, particularly as the new Act is more explicit than the old with regard to the prohibition against registering marks which are confusingly similar to marks registered in the Patent Office.

Conclusion

In view of the importance of trade marks in competition and the general importance of the Questions presented, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWIN J. BALLUFF,
3355 Penobscot Building,
Detroit 26, Michigan,
Attorney for Petitioner.

APPENDIX A

15 U.S.C. 85

No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade mark on account of the nature of such mark unless such mark—

(a) Consists of or comprises immoral or scandalous matter.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: *Provided,* That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club or society prior to the date of adoption and use by the applicant: *Provided,* That trade marks which are identical with a registered or known trade mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: *Provided,* That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this subdivision of this chapter: *Provided, further,* That no portrait of a living individual may be registered as a trade

mark except by the consent of such individual, evidenced by an instrument in writing, nor may the portrait of any deceased President of the United States be registered during the life of his widow, if any, except by the consent of the widow evidenced in such manner: *And provided further,* That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes, which was in actual and exclusive use as a trade mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February 20, 1905: *Provided further,* That nothing herein shall prevent the registration of a trade mark otherwise registrable because of its being the name of the applicant or a portion thereof. And if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade mark in the additional classes to which said new additional articles manufactured by said person or corporation shall apply, after said trade mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year, provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade mark or one so similar as to be likely to deceive in such additional class or classes. (Feb. 20, 1905, ch. 592, Sec. 5, 33 Stat. 725; Mar. 2, 1907, ch. 2573, Sec. 1, 34 Stat. 1251; Feb. 18, 1911, ch. 113, 36 Stat. 918; Jan. 8, 1913, ch. 7, 37 Stat. 649; Mar. 19, 1920, ch. 104, Sec. 9, 41 Stat. 535; June 7, 1924, ch. 341, 43 Stat. 647.)

15 U.S.C. 1052

No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused

registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or mistake or to deceive purchasers: *Provided*, That the Commissioner may register as concurrent registrations the same or similar marks to more than one registrant when they have become entitled to use such marks as a result of their concurrent lawful use thereof in commerce prior to any of the filing dates of the applications involved and the Commissioner or a court on appeal determines that confusion or mistake or deceit of purchasers is not likely to result from the continued use of said marks under conditions and limitations as to the mode or place of use or the goods in connection with which such registrations may be granted which conditions and limitations shall be prescribed in the grant of the concurrent registrations thereof; and concurrent registrations may be similarly granted by the Commissioner with such conditions and limitations when a court has finally determined that more than one person is entitled to use the same or similar marks in commerce. The Commissioner shall give not less than thirty days' written notice to all

applicants, registrants, and users specified by any of the parties concerned of any application for concurrent registration and of the time and place of the hearings thereon. When the Commissioner decides to grant a concurrent registration the proposed registration shall be published in the Official Gazette of the Patent Office and the application shall be subject to opposition as hereinafter provided in this chapter for other applications to register marks. Concurrent registrations may be ordered by a court in an action under the provisions of section 63 of Title 35, under such conditions and limitations as the court considers proper in accordance with this chapter.

(e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, or (3) is primarily merely a surname.

(f) Except as expressly excluded in subsections (a), (b), (c), and (d) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as *prima facie* evidence that the mark has become distinctive, as applied to the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years next preceding the date of the filing of the application for its registration. (July 5, 1946, ch. 540, title I, Sec. 2, 60 Stat. 428.)

15 U. S. C. 1063

Any person who believes that he would be damaged by the registration of a mark upon the principal register may, upon payment of the required fee, file a verified notice of opposition in the Patent Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 1062 of this title of the mark sought to be registered. For good cause shown, the time for filing notice of opposition may be extended by the Commissioner, who

shall notify the applicant. An unverified opposition may be filed by a duly authorized attorney, but such opposition shall be null and void unless verified by the opposer within a reasonable time after such filing to be fixed by the Commissioner. (July 5, 1946, ch. 540, title I, Sec. 13, 60 Stat. 433.)

15 U. S. C. 1122

Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this chapter in the same manner as provided for in cases under the patent laws. (July 5, 1946, ch. 540, title VI, Sec. 40, 60 Stat. 440.)

28 U. S. C. 1256

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 928, eff. Sept. 1, 1948.)